A

PP

v.

SYAHRIL RAZALI

B

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
ABDUL AZIZ RAHIM JCA
TENGKU MAIMUN JCA
[CRIMINAL APPEAL NO: B-05-329-12-2012]

C

20 SEPTEMBER 2013

CRIMINAL LAW: *Penal Code - Section 304(a) - Act of strangulation causing death - Whether intentional - Whether prompted by sudden provocation - Surrounding circumstances before and after commission of*

D

act - Whether intention could be derived - Whether prosecution discharged burden of proving intention

CRIMINAL PROCEDURE: *Conviction - Conviction on lesser charge - Appeal against - Original charge for murder reduced to culpable homicide not amounting to murder - Distinction between offences of*

E

culpable homicide and murder - Whether prosecution discharged burden of proving intention - Whether trial judge judicially appreciated evidence of state of mind of accused - Penal Code, ss. 299 & 300

A quarrel ensued between the accused ('respondent') and his

F

girlfriend ('the deceased') when the deceased rejected the respondent's proposal to marry her. Driven by anger, the respondent strangled the deceased. The respondent then left the house to calm himself and returned shortly thereafter and tried to revive the deceased but found that she was already dead. The

G

respondent subsequently met his family members who advised him to surrender himself to the police, which the respondent did. The cause of death of the deceased was confirmed to be asphyxia due to manual strangulation. The respondent was charged with an offence of murder of the deceased under s. 302 of the Penal Code

H

('Code') and at the end of the defence case, the trial judge reduced the charge to one of culpable homicide not amounting to murder under s. 304(a) of the Code. The respondent was convicted on the reduced charge and sentenced to 20 years imprisonment. Dissatisfied with the decision, the prosecution

I

appealed. The primary issue in this case was whether the act of strangulation by the respondent that resulted in the death of the deceased was intentional and whether it was prompted by sudden provocation in the heat of passion.

Held (dismissing appeal; affirming decision of High Court) Per Abdul Aziz Rahim JCA delivering the judgment of the court:

(1) Intention is a matter of inference and to establish a person's intention in doing an act, the surrounding circumstances in which the act was done was looked at. The circumstances must not only be confined to the circumstances at the moment of the commission of the act, but also to circumstances that existed immediately before and after the event. (para 15)

(2) The offences of culpable homicide and murder have been defined under ss. 299 and 300 of the Code. Whether the offence is culpable homicide or murder depends on the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. (*Tham Kai Yau & Ors v. PP*, refd). (paras 25 & 26)

(3) Based on the distinction between s. 299 and s. 300 of the Code and having reviewed the defence advanced by the respondent, it was found that the prosecution had failed to prove intention. Although the defence of sudden and grave provocation might not be available to the respondent, the absence of such provocation does not absolve the prosecution from the burden of proving intention on the part of the respondent to cause the death of the deceased. The reaction shown by the respondent towards the deceased at the spur of the moment was natural. The trial judge had judicially appreciated the evidence of the state of mind of the respondent when the respondent shook the deceased by holding her neck. (paras 27 & 28)

(4) The act and conduct of the respondent almost immediately after the event also did not show the presence of intention to kill. It was uncontroverted fact that upon his return to the house after he had calmed himself at the nearby coffee shop and discovered that the deceased was dead, the respondent immediately went to see his father, his uncle and another person and confided to them what had happened. The respondent subsequently surrendered himself to the police. Such conduct was not consistent with the conduct of a person who had every intention to kill the deceased. (para 31)

(5) The respondent, in a fit of rage or anger, had grabbed the neck of the deceased and shook her violently. The evidence was consistent throughout the prosecution and the defence case and the trial judge found it inherently credible. Therefore, the respondent had, at the spur of the moment and without realising, used excessive force; but with no intention to kill the deceased or to cause such injuries as were likely in the ordinary course of event to cause the death of the deceased. (para 32)

Bahasa Malaysia *Translation Of Headnotes*

Suatu pertengkaran berlaku di antara tertuduh ('responden') dan teman wanitanya ('si mati') apabila si mati menolak lamaran responden untuk mengahwininya. Disebabkan oleh kemarahan, responden mencekik si mati. Responden kemudian meninggalkan rumah tersebut untuk menenangkan dirinya dan kembali tidak lama selepas itu dan cuba untuk menyedarkan semula si mati tetapi mendapati bahawa dia telah pun meninggal dunia. Responden kemudian berjumpa dengan beberapa orang ahli keluarganya yang menasihatinya untuk menyerah diri kepada polis, yang dilakukan oleh responden. Sebab kematian si mati disahkan sebagai asfiksia akibat cekikan dengan tangan. Responden dituduh dengan kesalahan membunuh si mati di bawah s. 302 Kanun Keseksaan ('Kanun') dan di akhir kes pembelaan, hakim bicara mengurangkan pertuduhan kepada homisid salah yang tidak terjumlah kepada pembunuhan di bawah s. 304(a) Kanun. Responden disabitkan atas pertuduhan yang dikurangkan tersebut dan dijatuhkan hukuman penjara 20 tahun. Tidak berpuas hati dengan keputusan tersebut, pihak pendakwaan merayu. Isu utama dalam kes ini adalah sama ada tindakan mencekik oleh responden yang mengakibatkan kematian si mati adalah dengan niat dan sama ada ia dibangkitkan oleh provokasi secara tiba-tiba dalam keadaan yang wujud ketika itu.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)
Oleh Abdul Aziz Rahim HMR menyampaikan penghakiman mahkamah:

(1) Niat adalah berkait dengan inferens dan untuk membuktikan niat seseorang dalam melakukan sesuatu tindakan, hal keadaan sekeliling di mana tindakan tersebut dilakukan adalah

dipertimbangkan. Hal keadaan tersebut tidak terhad kepada keadaan pada masa tindakan tersebut dilakukan, tetapi keadaan yang wujud sejurus sebelum dan selepas kejadian.

(2) Kesalahan homisid salah dan membunuh telah ditafsirkan di bawah ss. 299 dan 300 Kanun. Sama ada kesalahan tersebut adalah homisid salah atau pembunuhan bergantung kepada tahap risiko kepada nyawa manusia. Jika kematian mungkin berlaku, ia adalah homisid salah; jika kemungkinan besar ia berlaku, ia adalah pembunuhan (*Tham Kai Yau & Ors v. PP*, dirujuk).

(3) Berdasarkan perbezaan di antara s. 200 dan s. 300 Kanun, dan setelah mempertimbangkan pembelaan yang dikemukakan oleh responden, didapati bahawa pihak pendakwaan telah gagal membuktikan niat. Walaupun pembelaan provokasi tiba-tiba dan serius tidak mungkin terbuka bagi responden, ketiadaan provokasi tersebut tidak membebaskan pihak pendakwaan daripada beban membuktikan niat pada pihak responden untuk menyebabkan kematian si mati. Reaksi yang ditunjukkan oleh responden terhadap si mati pada ketika itu adalah biasa. Hakim bicara telah mempertimbangkan secara kehakiman keterangan mengenai keadaan fikiran responden semasa responden mencekik si mati.

(4) Tindakan dan kelakuan responden sejurus selepas kejadian juga tidak menunjukkan niat untuk membunuh. Adalah fakta yang tidak boleh disangkal bahawa selepas kembali ke rumah tersebut selepas menenangkan dirinya di kedai kopi yang berdekatan dan mendapati bahawa si mati telah meninggal dunia, responden terus pergi berjumpa dengan bapanya, pakciknya dan seorang lagi dan menceritakan kepada mereka apa yang telah berlaku. Responden kemudian menyerah diri kepada pihak polis. Tindakan sedemikian tidak konsisten dengan tindakan seseorang yang mempunyai niat untuk membunuh si mati.

(5) Responden, dalam keadaan berang atau marah, telah menyambar leher si mati dan menggoncangnya dengan ganas. Keterangan tersebut adalah konsisten di sepanjang kes pendakwaan dan pembelaan dan hakim bicara mendapati ia adalah sememangnya boleh dipercayai. Oleh itu, responden telah, secara tiba-tiba dan tanpa sedar, menggunakan

kekerasan; tetapi tanpa niat untuk membunuh si mati atau untuk menyebabkan kecederaan yang berkemungkinan, dalam penjalanan biasa, akan menyebabkan kematian si mati.

Case(s) referred to:
PP v. Sanin Othman [2011] 1 CLJ 626 CA ***(dist)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***
Tan Hoi Hung v. PP [1966] 1 LNS 194 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 7
Penal Code, ss. 299, 300, 302, 304(a)

For the prosecution - Lailawati Ali; DPP
For the respondent - Geethan Ram Vincent; M/s Salehuddin Saidin & Assocs

[Editor's note: For the High Court judgment, please see PP v. Syahril Razali [2012] 1 LNS 1027.]

Reported by S Barathi

JUDGMENT

Abdul Aziz Rahim JCA:

[1] On 10 March 2008, the respondent (the accused before the High Court) went to see some members of his family and informed them that he had strangled his girlfriend Siti Hajar binti Abd. Razak (the deceased) when they were having a quarrel at their house at No. CTN-22, Tingkat 15, Grandeur Tower, Jalan Pandan Indah 1/16, Ampang in the district of Ampang Jaya in the State of Selangor.

[2] According to the evidence, the quarrel started when the deceased rejected the respondent's proposal to marry her. During the quarrel that had ensued and driven by anger, the respondent had strangled the deceased. The respondent then left the house to calm himself. Shortly after, the respondent returned and tried to revive the deceased but he found that the deceased was already dead.

[3] The respondent then went to see his auntie (SP14), his father (SP13) and his uncle (SP5). On their advice, the respondent surrendered himself to the police. The respondent was taken to Pandan Indah Police Station by SP5 and SP13 on the same day. A police report (exh. P47) was lodged with SP15, a police officer at Pandan Indah Police Station.

[4] SP15 and several police personnel took the respondent to the scene of the incident. Using the key obtained from the respondent, SP15 and his team entered the room where the body of the deceased was found. The deceased's body was covered with a blanket and the respondent identified the body as that of his girlfriend.

[5] A post mortem was conducted on the deceased by SP19, the pathologist, who testified that the cause of death was asphyxia due to manual strangulation.

[6] The respondent was charged with an offence of murder of the deceased under s. 302 of the Penal Code. After a full trial, at the end of the defence case, the trial judge reduced the charge to one of culpable homicide not amounting to murder under s. 304(a) of the Penal Code. The respondent was found guilty and was convicted on the said reduced charge. The respondent was sentenced to 20 years imprisonment.

[7] In her grounds of judgment dated 2 September 2012, the learned High Court Judge gave the following reasons for her decision:

(1) The court was satisfied that the accused had no intention whatsoever to kill the deceased or to cause such bodily injury which he knew would in the ordinary cause of events cause her death;

(2) The court was satisfied that the act which caused the death of the deceased was an act of passion committed while he was enraged because of the grave and sudden provocation on the part of the deceased as she had promised to marry him, had caused the breakdown of his marriage but had refused to marry him, had taunted him, had made disparaging remarks about his 2 children who he loved dearly and she also had another lover while she was already in a committed relationship with the accused and his sudden rage had deprived him of his ability to form the requisite intention to willfully and deliberately cause the death of the deceased or such injuries which were likely to cause her death;

(3) The DNA report which was produced by the DNA expert showed that the deceased had another lover and this could have been the real reason why she had changed her mind about wanting to marry the accused after having promised to marry the accused and that she had kept this information

A from the accused and it reinforced the accused's defence that he was frustrated because the deceased had refused to accept his many proposals of marriage;

(4) The pathologist who had performed the post-mortem examination on the deceased had testified that the deceased
B died almost instantaneously as a result of being strangled by the accused and hence there was a doubt created that the accused did not intend to cause the deceased's death because he had reacted in a fit of anger;

C (5) The pathologist also said that there were no defence injuries on the deceased because she was either too drunk or was sleeping when the accused pressed her neck with both his hands and a doubt was created that because the deceased was drunk it was possible that she had said all the words which the accused had claimed she had said during their
D lovers' quarrel and which had incensed him and deprived him of the ability to form the requisite *mens rea* to kill her or to cause such injuries which will in the ordinary course of events cause her death;

(6) Since the death of the deceased occurred so fast and there
E was no evidence to show that the accused had really wanted to kill her by strangling her and that he had only pressed his two hands against her neck to shake her and to make her realize the intensity and sincerity of his marriage proposal the court was of the view that the defence of the accused
F had cast a doubt on the prosecution case on the original charge of murder;

(7) The reaction of the accused was such that he had without realizing it used excessive force but there was no intention on his part to kill the deceased or to cause such injuries as
G were likely in the ordinary cause of events to cause her death; and

(8) The defence of the accused was put forward at the outset from the time he informed his relatives to the time they testified in court as prosecution witnesses and, therefore, his
H evidence was consistent and, inherently credible and was accepted by the court.

[8] Not satisfied with the decision of the learned High Court Judge, the appellant (ie, the Public Prosecutor) now appeals to us.
I Having read the record of appeals, the written submissions filed by both the appellant and the respondent and having heard their

respective oral submissions before us, we came to a unanimous decision that this appeal should be dismissed. We now give our reasons.

[9] In this case, the fact that the respondent had strangled the deceased's neck and that the respondent's DNA profile was found on the neck of the deceased was not in dispute. The primary issue in this case is whether the act of strangulation by the respondent that resulted in the death of the deceased was intentional and whether it was prompted by a sudden provocation in the heat of passion. It is also a fact that there was no defensive wounds found on the deceased.

[10] The appellant argued that the respondent had the intention to kill the deceased or to cause injuries which are sufficient in the ordinary cause of nature to cause death. The appellant relied mainly on the evidence of the pathologist, SP19. In his evidence, SP19 gave his opinion as follows:

(a) The death was not accidental but caused by manual strangulation.

(b) The left thyroid bone of the deceased was fractured and there were injuries on the deceased's neck.

(c) The bruises and wounds on the deceased's neck showed that the strangulation on the deceased's neck was for a considerable period.

(d) There was no defence injury found on the deceased which shows that the deceased was not defending herself when attacked and possibly the deceased was asleep or drunk when she was attacked.

(e) The deceased was lying on her left side when she was strangled.

(f) It was impossible the injuries was caused due to suffocation during sexual intercourse.

(g) There were bruises on the left cheek and mouth of the deceased caused by a punch or caused by punching and slapping.

(h) It is possible that the attacker was in the state of anger when the attacker strangled the deceased.

[11] Harping on the evidence given by the pathologist as to the injuries to the neck of the deceased, the learned Deputy Public Prosecutor (DPP) for the appellant submitted that the intention to kill may arise instantaneously and at the moment the act that cause the death was performed. To support his argument, the learned DPP referred to us the case of *PP v. Sanin Othman* [2011] 1 CLJ 626; [2011] 5 MLJ 716, where the Court of Appeal had said that it could never be overly emphasised that the intention can be formulated on the spot. The learned DPP further submitted that the neck is an important and vulnerable part of the human body. It is the link between the various respiratory organs that are found in the area between the nose and the lung. An act of strangulation she said, will prevent a person from breathing and could result in suffocation and eventually death. She further submitted that SP19 had given evidence that to strangle a person for 30 seconds is sufficient to cause the person to suffocate and result in death. She further submitted that SP19 had, in his evidence, ruled out that the act of strangulation of the deceased by the respondent is something that is accidental or unintentional. Therefore she argued that in this instant case, the act by the respondent in strangling the deceased was done intentionally.

[12] The learned DPP referred to us the case of *Tan Hoi Hung v. PP* [1966] 1 LNS 194; [1966] 1 MLJ 288, where intention is distinguished from motive. According to the case, intention indicates a person consciously shaping his conduct so as to bring about a certain result; whilst motive indicates the reason why he desires that result. The learned DPP therefore argued that if a man knowingly does something, then not only does he intend to do it, but in the absence of anything to the contrary, he must be taken to have intended the natural and probable consequences of his act.

[13] It is a fact that intention is a matter of inference. The learned High Court Judge in her judgment had ruled out intention of the respondent to kill the deceased. On this point, the learned High Court Judge had said as follows:

> (4) The pathologist who had performed the post-mortem examination on the deceased had testified that the deceased died almost instantaneously as a result of being strangled by the accused and hence there was a doubt created that the accused did not intend to cause the deceased's death because he had reacted in a fit of anger.

[14] The learned DPP submitted that this finding by the learned High Court Judge is against the weight of the evidence in particular, the testimony of SP19 who said that manual strangulation normally causes death and pressing on the person's neck for 30 second could cause death. The learned DPP also attacked the finding of the learned High Court Judge that:

> (6) Since the death of the deceased occurred so fast and there was no evidence to show that the accused had really wanted to kill her by strangling her and that he had only pressed his 2 hands against her neck to shake her and to make her realize the intensity and sincerity of his marriage proposal the court was of the view that the defence of the accused had cast a doubt on the prosecution case on the original charge of murder ...

and argued that the learned High Court Judge had over simplified the evidence. She submitted that the injury to the deceased's neck caused by the respondent resulted in the fracture to the left side of the neck. Therefore she submitted, the finding by the learned High Court Judge is not consistent with the act of the respondent to shake the deceased and to make her realise the intensity and the sincerity of his marriage proposal. Instead, the learned DPP submitted that the act of the respondent is much more than that. From the injuries suffered she said, it shows that excessive force was used over the deceased.

Our Views And Findings

[15] We accept the proposition by the learned DPP that intention is a matter of inference. That means, to establish a person's intention in doing an act, we look at the surrounding circumstances in which the act was done. These circumstances must not only be confined to the circumstances at the moment of the commission of the act, but also to circumstances that existed immediately before and after the event. We say so because s. 7 of the Evidence Act 1950 (Act 56) states as follows:

> 7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity of their occurrence or transaction, are relevant.

[16] With regard to the circumstances that existed before the event, we only have the evidence of the respondent himself. In his testimony, the respondent had said that at that material time, he

A was married. He came to know the deceased in 2004. The deceased then was working as a GRO at Superstar Night Club Bukit Bintang. He testified further that he rented a room and stayed there with the deceased for about two years before the incident. The respondent said in his examination-in-chief that
B "perhubungan saya dengan teman wanita saya (deceased) adalah seperti suami isteri" (word in bracket is for emphasis). The respondent testified that they were not married because the deceased refused to marry him and gave excuses such as she was not ready, but the respondent testified that he waited patiently
C because he loved her.

[17] With regard to the circumstances at the time of the incident, the respondent's testimony is as follows:

> D Pada 9.3.2008, lebih kurang jam 2-3 petang, saya dan teman wanita bangun. Kami telah mengadakan perhubungan seks. Selepas itu saya telah minta dia berkahwin dengan saya. Dia memberi alasan kepada saya dia tidak sedia. Dia mempertikaikan saya selalu jumpa dengan anak-anak dan gunakan itu sebagai alasan untuk berjumpa dengan bekas isteri saya.
>
> E Dia suruh saya balik kepada isteri saya. Dia kata "you gila dengan bekas isteri. You baliklah kepada bekas isteri you". Saya rasa geram dengan kata-kata dia.
>
> Saya pegang leher dia dan saya goncangkan 3-4 kali dan saya
> F tampar dia. Saya pegang leher dia sekejap.
>
> Saya ambil kunci kereta dia dan saya keluar untuk makan. Dia ada panggil saya.
>
> Tapi saya frust. Saya tak peduli.

G **[18]** The respondent also testified that the argument with the deceased was for about five to ten minutes and such arguments were quite often. As to the matter that was the subject of the arguments, the respondent testified as follows:

> H Bukan bertengkar dengan suara yang kuat. Dengan perasaan saya. Dia selalu kata bekas isteri saya dan minta saya balik kepada bekas isteri saya. Sedangkan saya telah tinggalkan bekas isteri saya dan anak-anak saya untuk duduk bersama dengan dia. Dia telah janji untuk berkahwin dengan saya. Kalau saya mahu bekas
> I isteri saya, saya tidak akan bercerai dengan bekas isteri saya.

[19] With regard to the circumstances that existed and the conduct of the respondent after the incident, the respondent stated that after leaving the house, after the quarrel, he went to have a meal at Stephen Corner, Pandan Indah. He was there for about 1 1/2 hours. He called the deceased's handphone but there was no reply. So, he decided to return to the house and he bought a package of "keropok" which he said is the favourite of the deceased. On reaching the house, he saw the deceased lying down and was dead. The respondent said he was shocked because the quarrel was only for a short while. The respondent's testimony is as follows:

> Selepas minum saya telah call handphone dia tapi dia tidak menjawab.
>
> Saya pergi untuk membeli keropok favourite kerana biasa kalau kami bertengkar dan saya beli keropok untuk dia, dia akan baik semula.
>
> Apabila saya balik saya tengok dia terbaring dan tidak bernyawa lagi.
>
> Saya pun terkejut. Kerana kami hanya bergaduh sebentar.

[20] The respondent then testified that he covered the deceased with a blanket and he returned to his kampung and met with his family. He told his family that he had quarreled with the deceased but he did not know how she had died. He told the story to one Mohd Ali bin Bakri, his auntie and his father. All of them told him to lodge a report if he did not know how the deceased died. The respondent agreed and lodged a report at Pandah Indah Police Station.

[21] In so far as the act of the strangulation of the deceased's neck, the respondent testified that he held the neck of the deceased not to kill her. He said he held the neck only for a short while. He further said that he was angry at the deceased and wanted to let off his anger. The respondent denied in his testimony that he punched the face or the mouth of the deceased.

[22] In cross-examination the respondent denied that he did not realise how long he had held the neck of the deceased. He also denied any intention to kill the deceased. The respondent further denied that he had made up the story about the "keropok" and that he had returned to the house after the incident. In cross-examination also the respondent said that he did not immediately

report to the police after he discovered the deceased was dead because he was afraid. This testimony of the accused found favour with the learned High Court Judge.

[23] The learned High Court Judge in her grounds of judgment had stated as follows:

> The court was satisfied that the act which caused the death of the deceased was an act of passion committed while he was enraged because of the grave and sudden provocation on the part of the deceased as she had promised to marry him, had caused the breakdown of his marriage but had refused to marry him, had taunted him, had made disparaging remarks about his 2 children who he loved dearly and she also had another lover while she was already in a committed relationship with the accused and his sudden rage had deprived him of his ability to form the requisite intention to willfully and deliberately cause the death of the deceased or such injuries which were likely to cause her death.

[24] The learned judge also found, on the evidence that intention was not proven. This is what the learned judge said in her judgment:

> Since the death of the deceased occurred so fast and there was no evidence to show that the accused had really wanted to kill her by strangling her and that he had only pressed his 2 hands against her neck to shake her and to make her realize the intensity and sincerity of his marriage proposal the court was of the view that the defence of the accused had cast a doubt on the prosecution case on the original charge of murder;
>
> The reaction of the accused was such that he had without realizing it used excessive force but there was no intention on his part to kill the deceased or to cause such injuries as were likely in the ordinary cause of events to cause her death; and
>
> The defence of the accused was put forward at the outset from the time he informed his relatives to the time they testified in court as prosecution witnesses and, therefore, his evidence was consistent and, inherently credible and was accepted by the court.

[25] The offence of culpable homicide and of murder have been defined under s. 299 and s. 300 of the Penal Code, respectively. The distinction between these two sections had been discussed by high authority in so far as the intention of the doer of the act is concerned. Such authority is the case of *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174, FC. To appreciate

this distinction we can do no better than to produce the relevant passages in that case *in extenso*. In that case, the Federal Court speaking through the judgment of Raja Azlan Shah FJ (as His Royal Highness then was) had said:

> A more difficult question that called for decision in this case was the offence of which the appellants should have been convicted. That was the other important ground of appeal, namely, that the learned trial judge failed to direct the jury properly or sufficiently or at all that where there is more than one inference which can reasonably be drawn from a set of facts, the inference most favourable to the accused should be adopted. In amplification of this ground of appeal we feel that it is the proper practice in cases of personal violence resulting in death for the judge to direct the jury on the right issue, in such a case as this, to arrive at a conclusion as to the degree of *mens rea* in the minds of the appellants. It cannot be disputed that intention is a matter of inference. The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow. In actual practice however it is frequently a matter of considerable difficulty to arrive at a conclusion by application of this principle in view of the close connection that the Penal Code makes between intention and knowledge. The provisions relating to murder and culpable homicide are probably the most tricky in the Code and are so technical as frequently to lead to confusion. Not only does the Code draw a distinction between intention and knowledge but subtle distinctions are drawn between the degrees of intention to inflict bodily injury.
>
> We therefore intend to deal at some length to emphasise and to discuss the distinctions between the provisions of section 299, Penal Code and section 300, Penal Code.
>
> Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that … the act is likely to cause death.
>
> Section 300, Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury

A as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and … is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

The words which I have italized show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. Illustration (d) of section 300, Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of section 300, Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in section 300, Penal Code is an example. It is on a comparison of these two limbs of section 299 and section 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of sections 299 and 300 is the tenuous contention that section 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions to section 300 apply, and if by reason of the absence of the necessary degree of *mens rea* an offence does not fall within section 300, it cannot be one of culpable homicide not amounting to murder punishable under section 304, Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to section 300, Penal Code apply, and (b) where the necessary degree of *mens rea* specified in section 299 is present, but not the special degrees of *mens rea* referred to in section 300, Penal Code.

> We would like in this connection to express the need to bear in mind that all cases falling within section 300, Penal Code must necessarily fall within section 299, but all cases falling within section 299 do not necessarily fall within section 300. The first part of section 304, Penal Code covers cases which by reason of the exceptions are taken out of the purview of section 300, clauses (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of section 299, but not within section 300, clauses (2) and (3). The second part of section 304, Penal Code covers cases falling within the third part of section 299 not falling within section 300, clause (4).

[26] In *Tham Kai Yau & Ors (supra)* the Federal Court emphasised the point that whether the offence is culpable homicide or murder depends on the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. The Federal Court also said that culpable homicide may not amount to a murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s. 300 of the Penal Code apply, and (b) where the necessary degree of *mens rea* specified in s. 299 is present, but not the special degree of *mens rea* referred to in s. 300 of the Penal Code. The Federal Court also caution that all cases falling within s. 300 of the Penal Code must necessarily fall within s. 299 but not all cases within s. 299 fall within s. 300 of the Penal Code.

[27] Bearing in mind the above views expressed by the Federal Court with regard to the distinction between s. 299 and s. 300 of the Penal Code, and having reviewed the defence advanced by the respondent in this appeal, we are in agreement with the finding of the learned High Court Judge that the prosecution had failed to prove intention. At this point we wish to state that in our view the defence of sudden and grave provocation may not be available to the respondent; however, the absence of such provocation does not absolve the prosecution from the burden of proving intention on the part of the respondent to cause the death of the deceased.

[28] The evidence in this case is that the respondent was filled with anger when the deceased rejected his proposal for marriage. In that spate of anger, the respondent had said that he grabbed the deceased by the neck and shook her in the heat of passion to drive some sense into the deceased regarding the seriousness

of his proposal. The respondent had already left his wife and children and came to live with the deceased, in a rented room, like husband and wife. In such circumstances, we are of the view that the reaction shown by the respondent towards the deceased at the spur of the moment was natural. We do not think that the thought of killing the deceased had ever crossed the mind of the respondent on the rejection of his marriage proposal by the deceased. We are of that view because the evidence shows that the respondent was in love with the deceased to the extent that he was willing to leave his wife and children for the deceased. The learned High Court Judge had judicially appreciated the evidence of the state of mind of the respondent when the respondent shook the deceased by holding her neck. The learned judge said:

> Her spoken words had incensed and enraged him and he lost his composure and self control. On the spur of that moment, in a fit of rage, he held her neck momentarily with his hands and started to shake her 3 to 4 times hoping to make her realize that he was really serious in wanting to marry her. He was also hoping that she would appreciate his sincerity and agree to marry him. He also slapped her.
>
> He was incensed because his love for her had led to the breakdown of his marriage. This in turn caused him a lot of pain and suffering because his marriage had produced 2 children who were still young. He loved them very dearly but he could not see them as often as he wished after his divorce.

[29] We observe that the evidence also shows that the police investigation had found a male DNA profile which the DNA expert PW16 had labeled as Male X from a seminal stain on a blanket in the room where the deceased body was found. However, we do not find any evidence to show that at the time the respondent was shaking the deceased by holding her neck, this fact about the Male X was ever known or disclosed to the respondent. We mention this to show, by process of elimination, that the presence of another male person in the life of the deceased as evidenced by the finding of the Male X's DNA profile by PW16 is not a relevant factor in assessing the intention of the respondent to kill the deceased out of jealousy or anger because of the presence of the unknown male person.

[30] The facts of this appeal are also distinguishable from the facts in *PP v. Sanin Othman* [2011] 1 CLJ 626; [2011] 5 MLJ 716, cited by the prosecution. The accused in that case was charged with murder in the first instance but the trial court convicted the accused on an amended charge of culpable homicide not amounting to murder under s. 304 of the Penal Code. On appeal to the Court of Appeal by the prosecution against the reduction in the charge, the appeal was allowed and the accused was convicted on the original charge of murder under s. 302 of the Penal Code. In *Sanin*'s case the accused had entered a shop armed with a knife with intention to commit robbery. In the course of committing the robbery, the accused had stabbed the deceased with the knife. On such evidence the Court of Appeal in *Sanin*'s case found that the accused had the intention to cause bodily injury to the deceased, and the bodily injury intended to be inflicted was sufficient in the ordinary cause of nature to cause death.

[31] The act and conduct of the respondent almost immediately after the event in this case also do not show the presence of intention to kill. It is uncontroverted fact that upon his return to the house after he had calmed himself at the nearby coffee shop and discovered that the deceased was dead, the respondent immediately went to see his father, his uncle and another person. The respondent told them what had happened. On their advice, the respondent surrendered himself to the police. In our mind, such conduct is not consistent with the conduct of a person who had every intention to kill the deceased.

[32] With regard to the evidence of the pathologist, PW19 that a pressure to the neck of the deceased for about 30 seconds would be sufficient to cause asphyxia and result in death, we are of the view that it is insufficient to show intention to kill. In our opinion it is incumbent on the prosecution to show that the respondent had knowledge that pressing one's neck for 30 seconds would probably cause death due to suffocation or asphyxia. As we have said earlier, and also found by the learned High Court Judge, the respondent in a fit of rage or anger had grabbed the deceased's neck and shook her violently. This evidence was consistent throughout the prosecution and the defence case and the learned High Court Judge had found it

inherently credible. Therefore, we are in agreement with the learned High Court Judge that at the spur of the moment, the respondent had, without realising, used excessive force; but with no intention to kill the deceased or to cause such injuries as were likely in the ordinary course of event to cause the deceased's death.

[33] For the above reasons, we are unanimous that this appeal should be dismissed and the finding and sentence by the learned High Court Judge is hereby affirmed.